No. 04-1198

IN THE
Supreme Court of the United States

John Melvin Alexander, *et al.*,
Petitioners,

v.

State of Oklahoma, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Brief of *Amici Curiae* National Lawyers Guild, National Conference of Black Lawyers, Center for Constitutional Rights and National Association for the Advancement of Colored People Supporting Petition for Certiorari

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Louisiana v. United States, 380 U.S. 145 (1965).....4

Loving v. Virginia, 388 U.S. 1 (1967).....4

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).....7

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000).....4

United States v. Mississippi, 380 U.S. 128 (1965).....4

OTHER AUTHORITIES

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* (4th ed. 1994) (DSM IV).....11

Amnesty International, *Amnesty International Report* (Dec. 2001).....17

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John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices* (2003).....15

United Nations Commission on Human Rights: *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. E/CN .4/Sub.2/1993/8 (July 2, 1993).....11

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INTEREST OF AMICI CURIAE[1]

The National Lawyers Guild is a national non-profit legal and political organization of lawyers, law students, legal workers and jailhouse lawyers dedicated to using the law as an instrument for attaining social justice. Founded in 1937 as an alternative to the then racially segregated American Bar Association, the Guild has been a major participant in the struggle for racial justice in the United States and has historically provided legal services to the civil rights movement and anti-racist activists.

The National Conference of Black Lawyers (NCBL) was founded in 1968 to serve as the legal arm of the Black Liberation Movement. It co-founded the National Coalition of Blacks for Reparations in America (N'COBRA) in 1989. The eradication of the vestiges of slavery cannot be accomplished absent full disclosure of the resistance to racial equality experienced in the public and private sectors. *Alexander v. The State of Oklahoma* is an opportunity for the United States Supreme Court to prevent an abuse of authority and require full disclosure of the role of the state in the 1921 destruction of the homes and businesses as well as the lives of the residents of "Black Wall Street" in Tulsa, Oklahoma.

The Center for Constitutional Rights is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has litigated numerous landmark cases on behalf of civil rights activists (including H. Rap Brown and the Chicago Seven). The Center recently succeeded in winning a settlement from the Street Crimes Unit of New York Police Department implementing an anti-racial profiling policy.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part and no person or entity, other than amici, their members and counsel made a monetary contribution to the preparation or submission of the brief.

the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. The NAACP has a long history of working to address violence against African Americans and to promote fairness in the administration of justice.

SUMMARY OF ARGUMENT

The doctrine of equitable tolling requires that the statute of limitations be tolled in the case of extraordinary circumstances, which existed in this case. The lower courts, however, failed to recognize the broad and persistent consequences of racism and white supremacy that affected the plaintiffs. By finding that extraordinary circumstances terminated shortly after the Jim Crow era, the Court failed to recognize that these conditions did not terminate at that time.

The pervasive racism that dominated American society during and after the time of the Tulsa Race Riot also engendered and enabled the creation of a "false historical narrative" which erased from historical memory the plaintiffs' cause of action. In conjunction with the recognized traumatic effects of human rights abuses on the victims, the false narrative concealed the cause of action from plaintiffs until the issuance of the Tulsa Race Riot Commission Report in 2001.

As recognized in international jurisprudence and urged by amici here, statutes of limitations should be tolled in cases of gross human rights violations like the events in Tulsa in 1921. Extraordinary circumstances persisted well beyond the Jim Crow Era and prevented plaintiffs from filing their cause claims prior to the issuance of the Commission Report in 2001. The question of whether these realities amount to extraordinary circumstances is a question that should have been answered by a jury, and the case should be remanded for such a determination.

ARGUMENT

I. INTRODUCTION

The plaintiffs, survivors and descendants of victims of the 1921 Tulsa Race Riot, filed this action to obtain reparations for

their losses as a result of the riot. The action was brought against government defendants who acted in concert with a white mob that destroyed the homes and businesses of African-Americans in Tulsa over forty square blocks of the city and caused the death of possibly as many as three hundred people. The action was filed after the official Commission appointed by the Oklahoma Legislature filed its Report in 2001, which for the first time documented the role of the state[2] in the racial violence.

The defendants pleaded the statute of limitations and argued that the suit was not timely. Although the courts below recognized that extraordinary circumstances prevented plaintiffs from filing the suit for decades after the Tulsa Race Riot, the courts held that suit should have been filed after the Jim Crow Era came to an end at some undetermined time in the 1960's, and granted judgment to the defendants.

Amici believe that it is essential for the Supreme Court to review this exceptionally important case and to reverse the decision of the Court of Appeals so that a jury may hear the case.

II. THE REALITY OF THE CONTINUING EFFECTS OF RACISM AND WHITE SUPREMACY IN THE UNITED STATES DEMAND THAT THIS COURT REVIEW THE FINDING OF THE COURTS BELOW THAT THE EXCEPTIONAL CIRCUMSTANCES THAT JUSTIFIED TOLLING THE STATUTE OF LIMITATIONS WERE TERMINATED WITH THE END OF THE JIM CROW ERA.

A. Resolution of the Question of When Plaintiffs Might Reasonably Have Been Expected to File Suit Requires an Analysis of the Role of White Supremacy in the Exceptional Circumstances in This case.

The District Court concluded that extraordinary circumstances had denied plaintiffs "a true opportunity to pursue their legal rights," but concluded that because the Jim Crow era had ended in the 1960's, the statute of limitations had run before

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[2] The term "state" is used in this context and throughout this brief to refer to the State of Oklahoma, the City of Tulsa, and government individuals acting in their representative capacities.

plaintiffs filed suit. The Tenth Circuit affirmed. Neither court below analyzed the role of the culture of white supremacy in creating and maintaining exceptional circumstances such as those present in this case.

The Supreme Court itself has never engaged in a thorough analysis of the culture of white supremacy and its impact on the cases that come before it.[3] The issue is of paramount significance in understanding the social context in which cases that involve race arise. The affirmative action cases in the Court in the past three decades are the most prominent example where such an analysis was essential, but lacking. In the absence of a thorough understanding of this problem, the Court has been left to speculate about when a "color blind" society might become possible. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

The instant case presents the Court with a compelling opportunity to analyze the extent to which the culture of white supremacy survived the civil rights movement of the 1950's and 1960's. Amici urge the Court to grant certiorari in order to explore these issues. Failing to come to terms with the true nature of America's race problem can only result in the perpetuation of the problem. As Prof. Dalton has written:

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[3] Justice Marshall did analyze these problems in his opinions, but most often in separate opinions or in dissent. See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265, 387 (1978). The term "white supremacy" has been used in only 15 opinions since 1928. There was at best a brief analysis of the issue related to the merits of the case in only a few of these opinions. *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 375 (2000) (Justice Breyer, dissenting, in Voting Rights Act case); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (white supremacy was goal of Alabama constitutional convention of 1901); *City of Lockhart v. United States* 460 U.S. 125, 140, n.3 (1983) (Justice Marshall concurring and dissenting, discussing contrivances to exclude blacks from voting prior to 1965 Voting Rights Act); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (purpose of Virginia's miscegenation statute was maintenance of white supremacy); *United States v. Mississippi*, 380 U.S. 128, 131, 144 (1965) (white supremacy was goal of Mississippi constitutional convention in 1890 and continued to motivate manipulation of voting laws for next 75 years); *Louisiana v. United States*, 380 U.S. 145, 149, 152 (1965) (Louisiana's efforts to maintain white supremacy through voting requirements from nineteenth century through 1950's and 1960's). In other opinions the term is used to refer to the ideology of racist groups or the demands of anti-racist groups, the term appears merely in connection with a citation to a previous case or is only tenuously related to the merits of the case.

> Dealing with our racial wound is very much like [dealing with a physical wound]. Healing is a process that has many steps. Yet we try to move too quickly from the traumatic event to the day the bandages are removed. In our zeal to avoid inflaming the wound, we fail to clean it properly. We rush to close it, and do not check to see if our stitches have held. We ignore the possibility of infection, and convince ourselves that the occasional oozing is nothing to worry about. We cover it with material that is contaminated, and leave the dressing unchanged for fear of what we may discover underneath. And so our racial wound festers. Harlon Dalton, *Racial Healing, Confronting the Fear Between Blacks & Whites* 99 (1995).

B. The End of The Jim Crow Era Was Not Sufficient to Dispel The Extraordinary Circumstances That Prevented Plaintiffs From Filing This Lawsuit.

The finding of the courts below that the statute of limitations was not tolled beyond the end of the Jim Crow era dramatically understated the nature of the extraordinary circumstances that precluded the plaintiffs from filing suit prior to the publication of the Commission Report. Although the courts below acknowledged the existence of racial intimidation, a hostile judiciary, the power of the Ku Klux Klan, the denial by officials of the truth of the riot, the grand jury indictment of only blacks for the riot and the existence of Jim Crow laws, the consideration of these phenomena was shallow and mechanistic. The Tulsa Race Riot, the Ku Klux Klan, Jim Crow laws and other specific events and institutions are merely manifestations of the underlying racial dynamic in the United States, the culture of white supremacy. They are not the problem itself.

Andrew Hacker explains the significance of the culture of white supremacy in this way:

> But as much as anything, being 'black' in America bears the mark of slavery. Even after emancipation, citizens who had been slaves still found themselves consigned to a subordinate status. Put most simply, the ideology that had provided the rationale for slavery by no means disappeared. Blacks continued to be seen as an inferior

> species, not only unsuited for equality but not even meriting a chance to show their worth ... And in our own time, must it be admitted at the close of the twentieth century, that residues of slavery continue to exist? The answer is obviously yes. Andrew Hacker, *Two Nations, Black and White, Separate, Hostile, Unequal* 14 (1992).

That the racial problem in the United States runs much deeper than the Jim Crow laws has been recognized by thoughtful commentators and political leaders. As Prof. Derrick Bell wrote in 1987:

> ... the task of equal-justice advocates has not become easier simply because neither slavery's chains, nor the lyncher's rope, nor humiliating Jim Crow signs are any longer the main means of holding black people in a subordinate status ... the law today does not speak from a genuinely color-blind vantage point. Despite having completed the vital task of eliminating Jim Crow racial classifications, legal institutions still operate with a perspective that remains perceptually, analytically, and functionally color-coded. The color is white. Derrick Bell, *And We Are Not Saved*, 5, 58 (1987).

Similarly the noted historian John Hope Franklin, Chair of President Clinton's Race Commission and a plaintiff in this lawsuit, has reminded us that America's racial problems will extend well into the next century:

> Writing at the beginning of this century, the distinguished African American scholar William E. B. Du Bois asserted that the problem of the twentieth century 'is the problem of the color line ...' Without any pretense of originality or prescience, with less than a decade left in this century, I venture to state categorically that the problem of the twenty-first century will be the problem of the color line. Franklin, *The Color Line: Legacy for the Twenty-First Century*, 5 (1993)

Justice Thurgood Marshall wrote:

> It is of course true that some of the Jim Crow laws ... were struck down by this Court ...Those decisions, however, did not automatically end segregation, nor did

> they move Negroes from a position of legal inferiority to one of equality ... The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

Regents of the University of California v. Bakke, 438 U.S. 265, 394-395 (1978). Justices Ginsburg and Breyer recently observed, "It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals." *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (concurring op.). Carl Rowan put it more dramatically: "Racism has not been as virulent throughout America since the Civil War, with short fuses burning on a thousand powder kegs." Carl T. Rowan, *The Coming Race War in America*, 4 (1996).

President Lyndon Johnson recognized that the removal of Jim Crow laws and practices was progress, but only limited progress, in dismantling the heritage of slavery and apartheid. Speaking at Howard University on June 4, 1965, the president stated:

> The voting rights bill will be the latest, and among the most important, in a long series of victories. But this victory ... 'is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning' ... You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please ... Much of the Negro community is buried under a blanket of history and circumstance. It is not a lasting solution to lift just one corner of that blanket. We must stand on all sides and we must raise the entire cover if we are to liberate our fellow citizens.

http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp (last visited March 21, 2005).

The culture of white supremacy has maintained its power, despite the fact that direct expressions of bigotry are no longer considered socially acceptable in most quarters. Tangible progress

toward material equality has been substantially less than is commonly thought. Carl Rowan explains:

> Black judges and generals, cabinet officers and columnists, and talk-show hosts and television anchors are prominent symbols of the racial progress that has taken place in this society over the last two generations. But these symbols create a veneer that hides the truth that for the overwhelming mass of black people, Hispanics, and other nonwhites, precious little has changed during the thirty years that gave us the so-called civil rights revolution. Rowan, *supra*, 18.

Rowan underlines that with respect to access to housing, education and economic well being generally, blacks lag far behind white America and cruel discrimination continues.[4]

Our limitations in understanding the magnitude of the problem are exacerbated by our failure to appreciate how distorted the telling of the history of race relations has been. As Prof. Banks and others have explained, "historians have distorted the history of racial subordination, starting during the slavery era, and ... popular culture perpetuates these distortions." Taunya Lovell Banks, "Exploring White Resistance to Racial Reconciliation in the United States," 55 Rutgers L. Rev. 903, 908 (2003). Prof. Banks specifically argues:

> Non-prejudiced whites, I argue, resist black reparations

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[4] "Jim Crow is maintained as much by bankers and mortgage companies as by hood-wearing white hoodlums ... even a black person of exceptional prestige and large financial resources has a more difficult time getting a housing loan than a white applicant with lesser qualifications. The difficulty is magnified if the black applicant is trying to integrate public housing in projects in formerly white neighborhoods!" Rowan, *supra* at 20. "The long-heralded 1954 Supreme Court decision in *Brown v. Board of Education* has failed in many important respects to wipe out Jim Crow in public education and to give blacks the most basic opportunities they were guaranteed forty years ago ... a visitor to the public schools of Birmingham, Atlanta, Washington, D.C., or Summerton, South Carolina, sees only token integration. Now, the most pernicious discrimination in public schooling takes place in the North – in the cities such as Boston, Chicago, Detroit." *Id.* "Blacks gained dignity from the Public Accommodations Act and political power from the Voting Rights Act. But the whole truth is that there can be only limited dignity and self-respect for those who live in poverty; and there is only limited political power for Americans who have no money and can afford no lobbyists or political action committees." *Id.* at 20-21.

> efforts because they are ignorant of the nature and condition of African slavery, de jure segregation, and the continuing vestiges of public and private discrimination against people raced as black in the United States. *Id.* at 911.

The distorted telling of history has affected the African-American population as well as white America. As Randall Robinson has written, "Now never begins yesterday. To set afoot a new and whole black woman and man we must first tell the victims what happened to them – before and after America was new." Randall Robinson, *The Debt*, 7 (2000). He notes that, "Here too, habit has become our enemy, for America has made an art form by now of grinding its past deeds, no matter how despicable, into mere ephemera. African Americans, unfortunately, have accommodated this habit of American amnesia all too well." *Id.* at 231.

Despite the horrors of the atrocities committed against the citizens of Greenwood, Tulsa's African-American community, it was remarkably easy for white Tulsans to hide the truth about what happened in the summer of 1921 for one simple reason: white Americans have always been ready to believe the worst about African Americans. Tim Madigan explains how Tulsa's conspiracy of silence was born:

> [B]y modern necessity, the events of 1921 became an embarrassment, something better forgotten. . . . The burning was like an ugly birthmark in the middle of Tulsa's cultural forehead that would forever disfigure the place. Unless, of course, it was covered up and forgotten. Those who could not forget meanwhile, consoled themselves with the notion that the burning had been the Negroes' fault – the whites had merely acted to put down an uprising of uppity and lawless blacks.

Tim Madigan, *The Burning* 251 (2001). Thus, the victims became the scapegoats, rendering them unworthy of receiving justice.

The work of A. Leon Higginbotham, Jr. demonstrates that Tulsa was not an isolated incident, but part of an historical pattern that continues to the present. In *Shades of Freedom: Racial*

Politics and Presumptions of the American Legal Process (1996), Judge Higginbotham chronicles six events, ranging from 1989 to 1995, in which whites falsely attributed terrible crimes they committed to black men because of the general knowledge that whites are ready and willing to believe the worst about African Americans. *Id.* at xxv-xxvii ("A Black Man Did It: Commonalities of Perception").

Judge Higginbotham says of such events:

> These highly publicized incidents reveal that, even in the late twentieth century, some persons will espouse false allegations that attribute the most egregious conduct to African Americans because they believe the public will unhesitatingly accept such stories ... [they] are part of a continuum [of racial animosity] that still has an unfair impact on American Americans, even at the present time. *Id.*

The conclusion that the plaintiffs have forfeited their cause of action by not filing suit at some arbitrarily determined time as designated by the District Court in part reflects a failure of the white community to assume ownership of the problem that the Tulsa Race Riot continues to pose. It is a form of blaming the victim that once again maintains white supremacy through subtle resort to a convenient stereotype – that blacks do not do things on time – thus undervaluing the continuing role of terror inflicted by state supported violence.

III. THE DEFENDANTS' CONSTRUCTION AND PERPETUATION OF A FALSE HISTORICAL NARRATIVE OF THE TULSA RACE RIOT, IN THE LIGHT OF THE HISTORY OF RACISM IN AMERICA, CREATED EXCEPTIONAL CIRCUMSTANCES THAT WERE NOT DISSIPATED UNTIL THE PUBLICATION OF THE OFFICIAL REPORT OF THE TULSA RACE RIOT COMMISSION.

A. The Effects of Historical Narrative and Trauma on Historical Memory.

In evaluating the statute of limitations issues in this case the falsification of the historical narrative and its effect upon

historical memory must be considered. A historical narrative is the story constructed about a historical event; historical memory is the way society ultimately remembers that event. The "collective amnesia" that is necessary for a false narrative to achieve credibility is a result of several influences. Reactions to traumatic stress, such as thought suppression and post-traumatic stress disorder, and the state's active fabrication of a false historical narrative, work in combination to psychologically and sociologically prevent victims from filing claims unless and until the state itself ultimately accepts culpability.

Traumatic stress reactions include "thought repression" and "thought suppression," processes which allow individuals to cope with traumatic events by either consciously or unconsciously forgetting the details of those events. Jonathan M. Golding, ed. *Intentional Forgetting*, 82 (1998). Often, individuals who suppress such thoughts are suffering from the condition known as post-traumatic stress disorder (PTSD), a salient characteristic of which is impaired and sometimes "total loss" of memory regarding the traumatic events. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4th ed. 1994) (DSM IV). People with such trauma may create alternate and even conflicting versions of the events they are suppressing. *Id.* PTSD sufferers also experience the following:

> The person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event and to avoid activities, situations, or people who arouse recollections of it. This avoidance of reminders may include amnesia for an important aspect of the traumatic event.

See DSM IV. The effects of these stress reactions are enduring and normally require intense therapy to address; some people suffering from PTSD never fully recover. *Id.*

For example, the victims of racial violence in Rosewood, Florida experienced these very effects. During a week of racial violence and murder in 1923, white mobs burned down every home in the predominantly African-American community of Rosewood. Hon. Bo Johnson, Special Master's Final Report, Re: HB 591 by Representatives De Grandy and Lawson (March 24,

1994). The trauma experienced by those victims is a compelling example that confirms the psychological research:

> Most of these [victims] blocked out the whole memory of Rosewood ... Historians interviewed the survivors, and they didn't even tell their sisters, or brothers, or children about Rosewood, they didn't even share the story with one another. Most of that was because of fear. You have to keep in mind that what these folks went through, and what they saw, was evidence of law enforcement officials working together with white militants to burn their community down and kill their neighbors. So not telling the story is not surprising.

David Colbun, *Rosewood and Historical Memory,* Public lecture at the University of Colorado recorded by counsel (March 29, 2005).

Such psychological reactions are profoundly durable, as documented by the United Nations Commission of Human Rights (UNHCR):

> It is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time.

United Nations Commission on Human Rights: *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN .4/Sub.2/1993/8 p. 154 (July 2, 1993).

The testimony of Dr. Eric Caine in this case documented that the victims of the Tulsa Race Riot suffered from similar traumatic stress reactions resulting in thought repression, amnesia, and psychic numbing. (Pet. App. 28a).

The dominant sectors in society often advance false historical narratives to rationalize or justify human rights abuses. The ultimate effect of a false historical narrative upon historical memory depends upon the public's willingness to accept the false narrative as true, the authority or power of the person advancing

the false narrative, and the opposing participants' power to counter or challenge the false narrative. In the case of the Tulsa Race Riot, these factors were ideally aligned for the perpetrators of the abuses, enabling the state to rapidly and dramatically influence society's historical memory of those events.

Principally the state was rendering a completely false historical narrative to a virulently racist audience that was willing to accept it wholesale. Indeed, the very purpose of the burning of the black community in Tulsa was to enforce white supremacy. As the Final Report of the Oklahoma Commission said:

> The intent [of the riot] was to intimidate one community, to let it be known and let it be seen ... a collective body – acting as one body – had coldly and deliberately and systematically assaulted one victim, a whole community, intending to eliminate it as a community. If other black communities heard about it and learned their lessons, too, so much the better; a little intimidation went a long way. (Pet. App. 45a)

Because the burning of the black community in Tulsa was such a dramatically public event, it took on the character of a mass lynching. Lynchings of black victims were clearly intended to reinforce white supremacy. As Prof. Ifill has written:

> The gathering of the mob, the public execution, the grisly display of the body, and the participation of hundreds or thousands of spectators were deliberately public acts of violence and terrorism ... lynchings were conducted as public ceremonies of white supremacy. Sherrilyn A. Ifill, "Creating a Truth and Reconciliation Commission for Lynching," 21 Law & Ineq. 263, 268 (2003) (footnotes omitted).

It is important to take into account that during the decades following the Tulsa Race Riot, there was extraordinary social complicity in lynching. There were nearly 3500 black victims of lynching between 1895 and 1964, forty of whom were in Oklahoma. U.S. Lynchings by Race and by Year ,Tuskeegee Institute, available at http:// www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html (last visited Mar. 21, 2005). Literally millions of white people

were implicated as either active participants or passive observers and lynching "flourished" with the "tacit approval or passive acceptance of ... police officers, prosecutors, judges, and elected officials." Ifill, *supra* at 267-268.

Despite the efforts of many proponents of such legislation Congress never passed an anti-lynching law. The apparent acceptance of lynching by the dominant culture and the horrible nature of these executions had a profound effect on the black community:

> Because any act perceived as racial insubordination could trigger violence, lynching imposed social, educational, and political controls on black life. While laws restricting the civil rights of blacks were external prohibitions on black advancement, lynching encouraged blacks to curb their own behavior, to turn away from opportunities for advancement, and to restrict their own individual and community growth and development. *Id.* at 287.

It cannot be assumed that the end of de jure segregation during the 1960's obliterated the effects of the widespread practice of lynching. As Prof. Ifill writes:

> ... it is alarming that little organized effort has been focused on addressing, engaging, and reconciling communities that experienced historical lynchings. Black communities were victimized by a powerful message of terror. Public reaction to the Rosewood, Florida and the Tulsa Race Riots demonstrate that racially victimized communities do not forget, but instead continue to suffer the scars caused by racial terror and vigilantism. *Id.* at 268.

Finally, the false narrative of the Tulsa Race Riot was advanced with the full legitimacy and authority of the state and the support and participation of the public, authority figures and media. The victims, marginalized, traumatized and oppressed legally and politically, had no ability to challenge the false narrative. As the Court of Appeals recognized, those few individuals courageous enough to challenge the narrative were silenced by the courts with impunity. *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir.

2004). Thus the false narrative remained the only legitimate version of the events.

B. Truth Commissions Play an Essential Role in Deligitimizing False Historical Narratives Advanced by the State.

The mutually reinforcing effects of intense trauma, racial oppression and the false narrative create a veritable fortress of impunity for the state where neither society nor the victims can establish the true version of events. This impunity cannot end until the state itself or an organization vested with commensurate authority acknowledges the state's culpability for human rights abuses. In recent decades, the mechanism for deligitimizing the false narrative has increasingly taken the form of the "truth commission."

Truth commissions are bodies created and authorized by the state to investigate a history of human rights abuses.[5] Two of the defining characteristics of a truth commission are a "finite and predetermined existence ending with the submission of a report ... and some sort of authority, by way of its sponsor, that allows it greater access to information greater security or protection to dig into sensitive issues and a greater impact with its report." Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* p.102 (2002).

The truth commission's unmatched investigatory power allows it to get "as complete a picture as possible of the nature, causes and extent of gross human rights violations." John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices*, 111 (2003). The state's endorsement of the truth commission allows it to access concealed documents and gives it a unique air of legitimacy for encouraging a reluctant witness to testify. It also creates an unparalleled level of publicity about the issue, bringing

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[5] Truth commissions have been established to address human rights abuses in the following countries: Argentina , Bolivia , Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Phillipines, Serbia and Montenegro (formerly Federal Republic of Yugoslavia), Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, United States, Uruguay, and Zimbabwe. See United States Institute of Peace, *Truth Commissions Digital Collection*. <http://www.usip.org/library/truth.html> (last visited, March 28, 2005).

previously unknown witnesses forward. Unlike individuals or private organizations, truth commissions are also endowed with sufficient resources enabling them to gather and analyze massive amounts of information.

Furthermore, no matter what individuals may suspect about the truth, a false narrative vested with the authority of the state remains the only legitimate version of historical memory until repudiated by an organization like a truth commission possessing the authority and legitimacy of the state. Mani, *supra* at 104. For example, truth commissions or similar bodies were established to investigate the 1923 massacre in Rosewood, the "disappearances" in Chile and other Latin American countries, and the abuses of the apartheid government in South Africa. In each of these cases, the truth commissions' reports for the first time authoritatively dispelled the false historical narratives that had been constructed surrounding those events.

For example, in Chile the 1991 report of the National Commission on Truth and Reconciliation revealed for the first time the true extent of the human rights crimes committed by the government of Augusto Pinochet. See e.g. Report of the Chilean National Commission on Truth and Reconciliation, Part Three (Feb. 1991) ("Rettig Report"). The dominant false historical narrative had created a historical memory that had been impossible for the victims or their advocates to pierce despite determined efforts. *Id.*

The commission identified specific abuses and crimes that had never before been identified or even suspected and found that, as happened in Oklahoma, "major sectors of public opinion allowed, tolerated, supported, and even concealed the violation of the human rights," and that the media was "willing ... to publish and broadcast whatever information the new government asked them to present." Rettig Report at Part Three, Chapter 1 § C(1) & (4).

As the Chilean commission discovered, the false historical narrative, created by "contradictory official accounts or complete silence on the part of officials," made legal redress by victims impossible prior to the issuance of the report, because officially they had no cause of action:

> In their official statements, government authorities referred to those who were killed or disappeared as criminals and terrorists who were dangerous to society. The press adopted that same kind of language and assumed that such persons were guilty. A segment of society also *absorbed those ideas, and so those who were wronged were not seen as victims*. The families say that the fact that the *government itself* was defaming their name and that they were prevented from publicly defending their loved ones harmed them in a way that was very hard to repair.

Rettig Report, Part Three, Chapter 4 § G(1) (emphasis added). Victims of the Chilean abuses testified that, "it was only after the [Rettig Report] that they gained the courage to come forward to present their case." Chile: Testament to Suffering and Courage, the Long Quest for Justice and Truth. *Amnesty International Report* 2 (Dec. 2001).

The events in Chile are but one example of this process. Prof. Banks compares what was found necessary in South Africa with the lack of a truth commission in the United States:

> The Jim Crow era in the United States ... has been compared to South Africa under apartheid. Yet, when apartheid ended in South Africa, that country's Constitutional Court acknowledged: 'A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed.' True racial and national reconciliation in South Africa could not occur, according to the Court, until that country had as complete a picture as possible of what happened during the Apartheid era ... In contrast, the United States has never had a public venting of the economic, social and psychological consequences of slavery, and the legalized racial apartheid that followed emancipation. Banks, *supra* at 908-909.

The Chilean and South African examples demonstrate a critical factual issue overlooked by the lower courts: When victims are traumatized by events and by the subsequent false historical narrative that blamed them for the abuses they suffered, and when the false historical narrative is furnished by the state and

accepted and facilitated by large segments of society, victims are prevented socially, psychologically and ultimately legally from bringing their claims until the issuance of a state-sanctioned report.

C. International Law Recognizes That The Effects of Trauma and Historical Memory Require Suspension of Statutes of Limitations.

The paralyzing effects of trauma and historical memory have been recognized in a number of international conventions and laws. Notably, the UNCHR has commissioned a study and drafted basic guidelines relating specifically to the issue of restitution and compensation for victims like those of the Tulsa Race Riot. The report found that statutes of limitations were often applied in order to find a procedural device to deny justice, even when it was clear that extraordinary circumstances should have prevented its application. UNHCR at 29, 49. The report stated that:

> As is borne out in this study, the application of statutory limitations often deprives victims of gross violations of human rights of the reparations that are due to them. The principle should prevail that claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations. In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, *statutory limitations shall not apply*.

UNCHR at 153-154 (emphasis added).

In addition, the overwhelming consensus of domestic and international human rights bodies is that statutes of limitations should not apply to gross human rights violations such as the Tulsa Race Riot. See, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. 40 UN Doc. a/7218 (entered into force Nov. 11, 1970) (countries shall "adopt ... any legislative or other measures necessary to ensure that statutory or other limitations shall not apply" to crimes against humanity); Article 29 of the Rome Statute of the International Criminal Code U.N. Doc. 2187 U.N.T.S. 90

(entered into force July 1, 2002) ("crimes within the jurisdiction of the Court shall not be subject to any statute of limitations"); European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, ETS 82, 13 I.L.M. 540, Jan. 25, 1974 (not in force) (specifically drafted to address this issue, stating that punishment of "crimes against humanity" should not be "prevented by statutory limitations whether in relation to prosecution or to the enforcement of the punishment.") Judicially created remedies, such as the doctrine of equitable tolling on which plaintiffs in this case rely, provide an appropriate avenue of relief from statutes of limitations as recommended by these international bodies.

IV. CONCLUSION

The rich mosaic of distorted racial history and the false historical narrative that was created with respect to the Tulsa Race Riot constitute a complex factual problem that should not be resolved on summary judgment. This Court should grant certiorari to reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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